

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



76-7544

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X

RICHARD S. KAYE,

:

Plaintiff-Appellant, :

-against-

:

FUNDING SYSTEMS CORPORATION,

:

Defendant-Appellee, :

EQUIMARK CORPORATION,

:

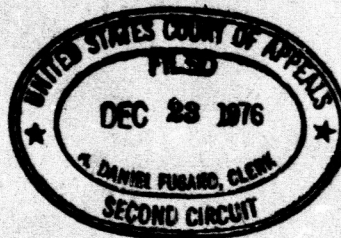
Defendant.

:

-----X

APPEAL FROM THE UNITED  
STATES DISTRICT COURT  
FOR THE SOUTHERN  
DISTRICT OF NEW YORK

Docket No.  
76-7544



B  
P/L

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES.....	(ii)
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.....	1
PRELIMINARY STATEMENT.....	2
STATEMENT OF THE CASE.....	3
The Claims of This Action.....	3
The Evidence of the Non-Disclosures.....	3
Preliminary Relief Against 1974 Shareholders Meeting.....	6
The Opinion Below.....	7
ARGUMENT.....	7
I - THE NON-DISCLOSURE WAS AND IS MATERIAL.....	7
II - THE COURT BELOW ERRED IN DISMISSING THE COMPLAINT AS MOOT.....	8
III - PLAINTIFF HAS PLEADED A CASE FOR REQUIRING THE HOLD- ING OF A SHAREHOLDERS MEET- ING AFTER DISCLOSURE OF THE NON-DISCLOSED FACTS.....	11
CONCLUSION.....	11

TABLE OF CASES

	<u>Page</u>
Browning Debenture Holders Committee v. DASA Corp., 524 F.2d 811 (2d Cir. 1975).....	9
GAF Corporation v. Milstein, 453 F.2d 709 (2d Cir. 1971).....	9, 10
Isaacs Brothers Co. v. Hibernia Bank, 481 F.2d 1168 (9th Cir. 1973).....	9, 10

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-and- :

EQUIMARK CORPORATION, :

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-----x

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

STATEMENT OF THE ISSUES  
PRESENTED FOR REVIEW

The issues presented for review are:

1. Whether an action to require disclosure to shareholders of certain facts relating to the business affairs of a publicly-held corporation, including the relations of that corporation to the owner of 54% of its stock, the unlawful acquisition of such control and various acts of waste of the corporation's assets

occasioned by the party controlling the corporation, all occurring approximately two years ago and all presently undisclosed to the shareholders of the corporation, is moot upon the divestiture by the controlling party of its interest in the corporation?

The court below answered this question in the affirmative.

2. Whether an action to declare a corporate annual meeting, held approximately two years ago, null and void or requiring the scheduling of a new meeting after disclosure to shareholders of certain facts is moot after the holding of the annual meeting where plaintiff diligently obtained an order prior to the meeting enjoining the meeting and the injunction order was reversed by this Court?

The court below answered this question in the affirmative.

#### PRELIMINARY STATEMENT

This brief is submitted on behalf of plaintiff-appellant. The appeal is from a decision of Judge Robert L. Carter of the United States District Court for the Southern District of New York and neither the decision nor supporting opinion is reported.

## STATEMENT OF THE CASE

### The Claims of This Action

The complaint (A-1-14), filed December 20, 1974 (A-vi), and the amended complaint (A-215-230) herein were filed by a shareholder (5,000 [A-53] of approximately 1,093,350 [A-74] shares outstanding) of defendant Funding Systems Corporation ("FSC") initially appearing pro se.

As to the defendant Equimark Corporation ("Equimark"), the complaint and amended complaint seek judgment against Equimark enjoining it from using its unlawfully acquired control over the affairs of FSC to continue to control the affairs of FSC (A-14, 229-230).

As to FSC, the complaint and amended complaint assert that FSC has failed to disclose to its shareholders the fact that during the year 1971 Equimark unlawfully acquired control over the affairs of FSC without prior approval of the Board of Governors of the Federal Reserve System as required by §4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and §225.4(b)(2) of Regulation Y (12 C.F.R. 225) promulgated pursuant thereto (A-2-3, 216-217) and that when Equimark belatedly

sought approval of this acquisition and was challenged in proceedings before the Board by plaintiff, Equimark withdrew its application for approval (A-4-5, 218-219). Other information alleged in the amended complaint to be undisclosed to FSC's stockholders includes:

(a) Facts relating to the claims of FSC's former chief executive officer that Equimark had diverted business and business opportunities from FSC to Equimark's own advantage and otherwise wasted the assets of FSC (A-219).

(b) Facts relating to Equimark's determination to discontinue its ownership of FSC's stock while representing to FSC's shareholders that it had no such plans (A-220).

(c) Facts relating to the adverse financial consequences to FSC should Equimark discontinue its ownership of stock of FSC (A-220).

(d) Facts relating to the determination by the Federal Reserve Board that Equimark's acquisition of this stock was unlawful (A-218).

(e) Facts relating to Equimark's acts in causing FSC to abandon certain assets and incur

leasehold liabilities (A-221) and the imposition by Equimark upon FSC of management which caused FSC's leasing operations to operate at a loss of \$2,035,000 for the nine-month period ending September 30, 1974 as compared to a profit of \$27,000 for the like period of 1973 (A-222).

The allegations are made in connection with the assertion that FSC's proxy statement respecting the annual meeting of FSC shareholders scheduled for December 27, 1974 (and at which plaintiff proposed that certain prophylactic resolutions be adopted [A-222-223]) omitted to disclose the above information and the complaint seeks judgment nullifying that meeting or, in the alternative, ordering the holding of a new meeting of FSC shareholders after the disclosure of the information referred to above.

#### The Evidence of the Non-Disclosures

For an outsider, plaintiff has obtained substantial evidence of the existence of the facts as to which he claims non-disclosure. This evidence includes the allegations in the complaint filed by FSC's former chief executive officer to the effect that Equimark abandoned and discontinued

various profitable or potentially profitable business interests and opportunities of FSC (A-18), Equimark prevented necessary capital expansion by FSC, terminated FSC's real estate related activities, used FSC as a place to employ persons to whom Equimark owed favors and took other steps to disrupt FSC's business to the benefit of Equimark (A-23-25). Plaintiff is in possession of a letter on behalf of Equimark to the Federal Reserve Board establishing the manner of Equimark's wrongful acquisition of stock of FSC (A-56, 77) and substantial evidence that Equimark misrepresented to the FSC shareholders Equimark's intentions in respect of capitalizing FSC and retaining its interest in FSC (A-58-59).

Preliminary Relief Against  
1974 Shareholders Meeting

Plaintiff pro se promptly moved for a preliminary injunction against the holding of the December, 1974 FSC shareholders meeting on the grounds that full disclosure of the relevant facts had not been made to the shareholders of FSC in the management proxy statement. The court below granted the relief requested (A-189), but was reversed on appeal by this Court without opinion (A-199). At the oral argument, the judges of this Court said that the meeting

should be held as scheduled because plaintiff would have a later opportunity to obtain his remedy.

The Opinion Below

In response to FSC's motion to dismiss, the court below ruled that each of plaintiff's claims for relief was now moot. The court ruled that it could not enjoin the 1974 shareholders meeting because it had already been held and could not schedule a new meeting since subsequent shareholders meeting have been held. The court ruled that, since the claims against Equimark were believed to be moot because Equimark had divested itself of control of FSC, disclosure of facts relating to Equimark's acquisition of FSC stock and Equimark's exercise of control of FSC was now moot (SA-17-19).

ARGUMENT

I

THE NON-DISCLOSURE  
WAS AND IS MATERIAL

At the 1974 shareholders meeting plaintiff proposed resolutions that a majority of the Board of Directors of FSC be independent of Equimark, that FSC establish a "Corporate Audit Committee" and that FSC furnish quarterly shareholders' reports to its shareholders. FSC's management

recommended against adoption of these resolutions (A-222-223, 47-49). Clearly, disclosures about Equimark's abuse of its control over the affairs of FSC would influence a shareholder in voting for or against these proposals.

Moreover, the proposals were included in the proxy statement issued by management (A-47-49) as required by Rule 14a-8 promulgated by the Securities and Exchange Commission regulating management proxies. Plaintiff would be deprived of the right to include the proposals in future management proxy statements, however, were his proposals to receive less than the required vote at the meeting or subsequent meetings at which they were proposed as specified by Rule 14a-8(c)(4). Therefore, FSC's failure to disclose constitutes a continuing jeopardy to plaintiff's opportunity to obtain shareholder approval of his prophylactic resolutions.

## II

### THE COURT BELOW ERRED IN DISMISSING THE COMPLAINT AS MOOT

The disclosure of the non-disclosed information could affect future shareholders' votes on the prophylactic resolutions to be offered by plaintiff and could help

the shareholders in determining whether to take any action on behalf of FSC or to cause FSC to take action to recover for the injuries occasioned FSC by Equimark's wrongful exercise of its wrongfully acquired control over the business affairs of FSC. Therefore, it was error to dismiss the complaint as moot. GAF Corporation v. Milstein, 453 F.2d 709 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1973); Isaacs Brothers Co. v. Hibernia Bank, 481 F.2d 1168 (9th Cir. 1973); Browning Debenture Holders Committee v. DASA Corp., 524 F.2d 811 (2d Cir. 1975).

In the DASA case, supra, this Court stated the rule which governs the present action as follows:

"When the behavior complained of is of such a nature that it might predictably be repeated again (for example, a pyramidal sales scheme), a prior declaratory judgment may serve the useful purpose of facilitating an injunction at a future date." 524 F.2d at 816.

Here it is entirely predictable that the non-disclosure will be repeated in a manner which will deprive plaintiff of a fair opportunity to obtain favorable shareholder action upon his prophylactic resolutions, and an appropriate judgment could be helpful in facilitating an injunction at a future date.

In the GAF Corporation case, supra, this Court refused to find a controversy moot even though the proxy contest which precipitated the action had been resolved in the victory of management at the annual meeting. This Court stated:

"The complaint here alleges that past violations of section 13(d) are continuing and that the conspiracy to take over GAF 'continues unabated.' In the light of these allegations we cannot say that the litigation has become mooted or that the cause for complaint has abated."  
453 F.2d at 714-715, n. 11.

Similarly, in Isaacs Brothers, supra, the court stated that an action would be dismissed as moot only where "there is no reasonable expectation that the wrong, if any, would be repeated \* \* \*." 481 F.2d at 1170. Here, according to FSC's own motion papers the action has been repeated twice -- two subsequent annual meetings have been held (SA-9) without disclosure of the facts which plaintiff alleges are material facts which should have been disclosed to the shareholders.

Therefore, to avoid the continuance of the harm caused plaintiff and the other shareholders of FSC by the continuous non-disclosure of material facts, the decision

below should be reversed and plaintiff should be permitted to pursue his appropriate remedy.

### III

PLAINTIFF HAS PLEADED A CASE  
FOR REQUIRING THE HOLDING OF  
A SHAREHOLDERS MEETING AFTER  
DISCLOSURE OF THE NON-DISCLOSED  
FACTS

In this action, plaintiff pursued diligently every remedy available to him and obtained injunctive relief prior to the holding of the December, 1974 annual meeting. The order granting the injunctive relief was reversed on appeal and the meeting held. The issue is not moot, however, because plaintiff did not wait until after the holding of the annual meeting and it was not his fault that it was not enjoined pending full disclosure.

Under the circumstances, the relief requested is reasonable -- and a shareholders meeting should be held after full disclosure respecting the abuse by Equimark of its unlawfully acquired control of FSC.

### CONCLUSION

For the foregoing reasons it is respectfully requested that the decision of Judge Carter be, in all respects, reversed.

Respectfully submitted,

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